Restricting prosecutors from encouraging waiver of right to counsel
HB 3152 by Escobar (Ellis)

DIGEST:
HB 3152 would have prohibited prosecutors from encouraging or initiating a defendant's waiver of the right to counsel. In addition, prosecutors could not have communicated with an indigent defendant who had requested the appointment of counsel unless the court had denied the request.

A court could not have asked a defendant to communicate with the prosecutor until the court advised the defendant of the right to counsel and how to obtain counsel and the defendant had been given a reasonable opportunity to do so. If an indigent defendant requested counsel, a court could not have encouraged the defendant to speak with the prosecutor unless the defendant's request for appointed counsel had been denied. A defendant's waiver obtained in violation of these rules would have been presumed invalid.

GOVERNOR'S
REASON FOR
VETO:
"House Bill No. 3152 would establish new requirements for the waiver of counsel in all criminal cases – even those punishable only by a fine, such as a traffic offense. There are a number of instances in which it is beneficial for prosecutors and defendants without attorneys to initiate discussions regarding a guilty plea or referral to trial. This bill would inhibit prosecutors' ability to seek plea bargains on minor offenses, resulting in a backlog of cases and an undue burden on the municipal, justice of the peace and county court systems.

"I have heard from prosecutors who argue that this bill would create tremendous confusion in our courts and could jeopardize hundreds of thousands of convictions. Under this bill, persons who wish to negotiate with prosecutors to resolve their cases would be prohibited from doing so unless a specific waiver is filed, and neither a judge nor a prosecutor could ask a defendant to file the waiver.

"Current law and court decisions provide adequate protections for defendants who wish to waive their right to an attorney."

RESPONSE:
Rep. Juan Escobar, the bill's author, said: "I introduced HB 3152 because during my many years as a law enforcement officer I saw too many cases where the prosecutor's only concern was to obtain a conviction.

"Making it easier for prosecutors to process cases cannot be an excuse to deny people their basic rights guaranteed by the Constitution. I am sorry that the governor does not agree that every American is entitled to a legal defense or at least to talk to a lawyer when they are charged with a crime. I would have thought that the miscarriages of justice in the Tulia cases would have made that clear to everyone."

Sen. Rodney Ellis, the Senate sponsor, said: "It is unfortunate that Gov. Perry felt that it was necessary to veto HB 3152, a bill that would have protected Texans' constitutional right to be represented by counsel.

"HB 3152 would have simply ensured that waivers of the right to counsel occur only after a defendant has been informed of the right to counsel and ensured that such waivers were knowing and voluntary, as required by the Constitution. The bill was unopposed in the Legislature — there were no witnesses in opposition at any stage, passed out of House committee unanimously, out of the House unopposed on voice vote, out of Senate committee unanimously, and on Senate Local and Uncontested.

"The governor provided number of reasons for vetoing and disapproving of HB 3152 to which I would like to respond:

1. "The governor states that HB 3152 would place an 'undue burden' and 'create tremendous confusion' in our courts. Not true; HB 3152 simply required judges to inform defendants of their right to counsel as required under the Constitution to obtain a valid waiver of that right to counsel before they can encourage a defendant to negotiate an uncounseled plea with prosecutors. This is a simple procedure to which courts should already be in compliance. Hardly an undue burden that creates confusion.

2. "The governor states that HB 3152 would 'inhibit' a prosecutor's ability to initiate plea discussions. In fact, prosecutors are already barred by their own disciplinary rules (Texas Disciplinary Rule of Professional Conduct 3.09) from initiating or encouraging efforts to obtain waivers of the right to counsel.

3. "The governor states that HB 3152 would 'jeopardize hundreds of thousands of convictions.' The truth is, HB 3152 merely protected the existing right to counsel by requiring that individuals be informed that they have the right to obtain counsel and that their decision to waive counsel be knowing and voluntary and expressed through a written waiver. It is the current unconstitutional practices of coercing waivers of the right to counsel that jeopardize convictions and inspired HB 3152. Case law provides that convictions obtained after a defendant waived counsel without being informed of this right and without an opportunity to request counsel are unconstitutional and should be overturned. The only reason we have not seen a significant number of reversals as a result of current practices is because these defendants, by definition of the problem, do not have lawyers to assert this valid constitutional argument on their behalf. HB 3152 would have ended these practices, and thus would have improved the certainty and reliability of convictions in the state of Texas.

4. "The governor states that 'current law … provide[s] adequate protections for defendants who wish to waive their right to an attorney.' The sad fact is that this is not the case. HB 3152 was a calibrated response to widespread practices that violate existing constitutional and case law. Putting these rules, which currently are scattered across several volumes of case law, into the statutory law would have been a significant step toward eliminating unconstitutional practices. It would have sent a strong signal to prosecutors and judges who are violating case law and ethical rules, and it would have provided a realistic remedy to the defendants affected by these practices."

NOTES: HB 3152 was analyzed in Part Three of the May 11 *Daily Floor Report*.